

**UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION**

**San Diego Gas & Electric Company,
Complainant,**

v.

Docket No. EL00-95-045

**Sellers of Energy and Ancillary Service Into
Markets Operated by the California
Independent System Operator Corporation
and the California Power Exchange,
Respondents.**

**Investigation of Practices of the California
Independent System Operator and the
California Power Exchange**

Docket No. EL00-98-042

**REPORT TO THE COMMISSION AND ORDER ADOPTING REVISED TRIAL
SCHEDULE, MODIFYING PROTECTIVE ORDER, AND GRANTING
INTERVENTION OUT OF TIME**

(Issued September 6, 2001)

TO THE COMMISSION:

As previously reported, at the August 13, 2001 prehearing conference, I adopted a trial schedule which required completion of data production by the California Independent System Operator (ISO) on issues 1 and 2¹ by August 17, final ISO data needed by the California Power Exchange (PX) and related to issue 3 by September 7, 2001, testimony on issues 1 and 2 to be filed by September 14, 2001, ISO data to the PX related to issue 3 to be provided by September 21, 2001, testimony related to issue 3² to be filed by September 28, 2001, rebuttal testimony to be filed by October 5, 2001,

¹ See the July 25, 2001 hearing order, mimeo at page 43.

² Id.

hearing commencing October 10 and concluding October 16, and my certification of proposed findings of fact by November 5, 2001. The schedule reflected a 45-day evidentiary process which, consistent with the Commission's July 25 hearing order, commenced with the completion of the data production process by the ISO and the PX.

A prehearing conference was held on September 5, 2001 at which the revised trial schedule reproduced below was adopted to address concerns of the PX set forth in a letter filed on August 29, 2001 as well as concerns of the California Generators and other participants. The PX reiterated that serious slippage had occurred in the ISO/PX joint production effort and that it doubted that it could meet the September 21, 2001 trial schedule deadline for provision of required data to the participants. In this respect, the ISO advised that it needed to rerun its pricing calculations for the period October 2, 2001 to October 20, 2001 to correct errors in the data that had been provided to the participants, would complete this function and provide revised statements to the PX by September 6, 2001 and that it expected to provide Account 407 data to the PX by the end of this week. Under these circumstances, the PX advised that October 12, 2001 was the earliest that it could provide the data required by the Commission and that it would need until October 17, 2001 to ensure that the data was correct and complete.

A further complication in the data production process concerned the ISO's inability to provide the participants by August 17, 2001 with "source data" which relates to real time despatch, bids, and hour-ahead schedules, which in turn would facilitate the filing of evidence on issues 1 and 2 by the September 14, 2001 trial schedule deadline. See Tr. at 78-9. The data allows the participants to recreate mitigated market clearing prices using their own methodologies and assumptions. By a letter filed on September 4, 2001, the California Generators indicated that the ISO had advised them that the ISO hoped to provide most of this data by September 7, 2001. The Generators said that they would need several weeks to analyze the data using different methodologies and assumptions in order to submit responsive testimony on issues 1 and 2.

Extensive discussion on and off the record resulted in the trial schedule proposal reproduced below that I adopted. The dates for provision of ISO and PX data reflect the realities involved in the data production process and, with provision for federal holidays, reflect the 45-day evidentiary process required by the Commission's July 25 hearing order.

Revised Trial Schedule:

- September 14, 2001 - Trial Stipulation on City of Burbank issues, including reservation of certain settlement-related issues outside of this case
- September 17, 2001 - Oral argument, 10:00 A.M., in the event that a trial stipulation has not been filed by September 14
- October 15, 2001 - Participants' simultaneous responsive testimony on issues related to mitigated market clearing price and any additional other sources of cost recovery³, stipulations and justification of section 202(c) transactions, and narrative summaries of material points, including page and line references thereto
- October 19, 2001 - Preliminary PX data and status report on grouping matters (number of groups/participants desiring cross-examination and estimates of time required for cross-examination) .
- October 26, 2001 - Participants' simultaneous responsive testimony on issues related to (2), and (3), APX's evidence on issue 2, and narrative summaries of material points, including page and line references thereto
- October 29, 2001 - Final PX data
- November 1, 2001 - Status report on grouping matters
- November 9, 2001 - Rebuttal testimony on all issues by all participants.

³ This includes the submission of emissions cost data required by the July 25 hearing order to be submitted by all sellers of "emissions costs incurred during the refund period for subtraction from their respective refund liabilities." See the July 25 hearing order, mimeo at page 41. I note that several requests for rehearing concern emissions cost data, including but not necessarily limited to that of the ISO at 32-33 and Duke Energy North America, LLC et. al. at 27.

- November 13, 2001 - 10:00 A.M., Oral Argument to Show Cause why the Protective Order should continue to apply to the hearing and on motions to strike; Joint Narrative Stipulation of Issues, Joint Exhibits, and Proposed Trial Stipulations; status report on grouping matters, including composition of witness panels and stipulated issues addressed by each panel, order of cross-examination of witness panels/witnesses, and estimates of time required for cross-examination, and a master exhibit list of all pre-filed exhibits
- November 14, 2001 - Commencement of Hearing, 10:00 A.M.
- November 20, 2001 - Conclusion of Hearing
- November 26, 2001 - Initial Briefs in the form of Proposed Findings of Fact and underlying evidentiary support and justification
- November 29, 2001 - Reply Briefs in the form of objections to November 26 Proposed Findings of Fact and underlying evidentiary support and justification
- December 13, 2001 - ALJ's Certification of Proposed Findings of Fact and record

Hypothetically, I asked the ISO and the PX to advise how much additional time might be required to complete the data production process in the event that the Commission, upon rehearing, modified its pricing methodology in the manner proposed by the ISO (and opposed in various respects by other participants who seek different relief). The ISO stated that it probably would be incumbent upon [it] "to recalculate the mitigated market clearing price and to have that the focus of attention in your evidentiary hearing." It contemplated that this would be a "two day exercise." Tr. at 270, 271. The ISO opined further that,

the next two steps, the calculation of refund amounts and amounts owed. . . will take four months [due to] the fact that the servers simply are physically limited, and we will have utilized every available server to do the work that has been required for the settlement reruns that are being put together—that have been put together for this phase of the proceeding. And we must also keep in mind that the

ISO fortunately is an ongoing institution. All of its hardware and software and personnel still have the obligation to keep that grid operating.

Tr. at 270-71.

In response to my inquiry, the ISO succinctly restated these views:

The two-day exercise is, let's assume the Commission says no, instead of using gas prices from this, you should have used widgets and come up with recalculated mitigated market clearing prices within a two-day interval. What we cannot do is then plug those into the settlement statements covering the entire refund period and come up with new amounts owed and owing. That's the four-month process.

Tr. at 271-72.

The PX pointed out that "if the mitigated market clearing price changes, then we have to recount our own data and go through the same process again and basically look upon the same time frame we are now dealing with." Tr. at 274.

A trial stipulation that seeks to reserve certain ISO and PX settlement-type issues for possible resolution outside of this proceeding has been proposed by certain participants as well as treatment of individualized issues 2 and 3, is the subject of ongoing discussion by the Grouping Committee⁴, and if finalized by September 14, 2001 could ameliorate the four-month process referenced by the ISO. In the event that the participants can not resolve the settlement-type issues informally, an oral argument has

⁴ To date, the Grouping Committee includes most of the active parties and is a work in progress: the ISO, the PX, the California Parties (the California Electricity Oversight Board, the CPUC, the California Attorney General, and the three investor owned utilities-PG&E, SDG&E, and SCE), Generator Group, including Calpine and AES, Marketer Group (about 17-18 marketers), out-of-state load serving entities which sold in California during the refund period and are load-serving utilities outside of the state, non-jurisdictional sellers comprised of a net-buyer and net-seller groups, the Automated Power Exchange, and Trial Staff. Tr. at 301-05. Under the revised trial schedule, status reports are to be filed by the Groupings Committee with regard to their order of cross-examination and estimated time required for cross-examination in an effort to ensure that the hearing remains within and does not exceed the 45-day evidentiary process.

been scheduled for September 17, 2001, inter alia, to determine if the settlement-type issues are within the scope of the issues set for hearing.

In this respect and in response to my inquiry, the ISO commented that it was rerunning the settlement statements but it was not correcting for disputes that may have been resolved or that are pending with respect to those settlement statements because it did not read the Commission's July 25 order as requiring it to purge out of those statements all matters that are in dispute that are subject to ADR and may be caught up in other Commission proceedings. Tr. at 330-31. Further brief discussion at the hearing reflected several different viewpoints on this issue. Before requiring the parties to finalize a resolution by a trial stipulation and, alternatively, requiring oral argument on this and other issues, I noted that I wanted to hear more at any oral argument – specifically, "why it's reasonable to understand that the Commission would override these processes [arbitration dispute resolution required by the ISO tariff and issues said to be involved in the utility bankruptcy proceedings] that are subject to the rule of law without any specific indication in any order that it's issued once this process began. . .that its pricing methodology and any changes it required would override specific processes. And I'd like to understand more about those particular processes that were cited by one or more of the petitioners ⁵ [for rehearing] so I could better evaluate that concern, assuming I have to." Tr. at 321-22.

The Appendix to this order reproduces an amendment to the Protective Order proposed by the participants and adopted by me at the prehearing conference. Based upon this amendment, the Generator Group withdrew its August 24, 2001 motion to amend the Protective Order.

Last, this order confirms my ruling which granted the uncontested motion filed on August 21, 2001 by the State Water contractors for leave to intervene out of time.

Bruce L. Birchman
Presiding Administrative Law Judge

⁵For illustrative purposes, compare the request for rehearing filed on August 24, 2001 by Dynegy Power Marketing, et. al. at 17-18 with that of the Salt River Project Agricultural Improvement and Power District at 23-24.

APPENDIX

AMENDMENT TO THE PROTECTIVE ORDER and NON-DISCLOSURE STATEMENT

21. The disclosing Participant shall physically mark those Protected Materials that the disclosing Participant believes in good faith contains market sensitive information, public disclosure of which would competitively harm the Participant, with the words "Not Available to Competitive Duty Personnel." However, solely with regard to the California ISO and California PX, Protected Materials produced after the adoption of this amendment shall only be marked with the words "Not Available to Competitive Duty Personnel" if any Participant asserts in good faith that the disclosure of requested data might be inappropriate for review by Competitive Duty Personnel, as defined in Paragraph 22. Participants must make such assertions within two (2) business days after receiving a data request from another Participant. Any challenge to such designations may be made as provided in this protective order for challenges to designations of materials.
22. Solely with respect to Protected Materials that have been marked "Not Available to Competitive Duty Personnel" (and information derived therefrom), a Reviewing Representative may not include any person whose duties include (i) the marketing or sale of electric power at wholesale, (ii) the purchase or sale of electric power at wholesale, (iii) the direct supervision of any employee with such responsibilities, or (iv) the provision of electricity marketing consulting services to entities engaged in the sale or purchase of electric power at wholesale (collectively, "Competitive Duties"). If any person who has been a Reviewing Representative subsequently is assigned to perform any Competitive Duties, or if previously available Protected Materials are changed to "Not Available to Competitive Duty Personnel," with the exception of the Reviewing Representative's own data, such person shall have no such access to materials marked "Not Available to Competitive Duty Personnel" (and information derived therefrom) and shall dispose of such Materials, and shall continue to comply with the requirements set forth in the Non-Disclosure Certificate and this Protective Order with respect to any Protected Materials to which such person previously had access. Notwithstanding the foregoing, person who otherwise would be disqualified as Competitive Duty Personnel may serve as a Reviewing Representative, subject to the following conditions: (i) the Participant who employs or has retained that person certifies in writing to the affected Producing Party that its ability to effectively participate in this proceeding would

be prejudiced if it was unable to rely on the assistance of the particular Reviewing Representative; (ii) the party claiming such prejudice must identify by name and job title the particular Reviewing Representative required; (iii) the party claiming such prejudice must acknowledge in writing to the affected Producing Party that access to the Protected Materials which are Not Available to Competitive Duty Personnel shall be restricted only to purposes of the litigation of this proceeding, absent prior written consent of the Producing Party or authorization of a decisional body (the Commission or the Presiding Administrative Law Judge with opportunity for the Producing Party to seek review of such decision as provided in this order); (iv) such party acknowledges that any other use shall constitute a violation of an order of the Federal Energy Regulatory Commission; and (v) the Competitive Duty Personnel acting as a Reviewing Representative has provided a declaration or affidavit acknowledging his or her familiarity with the contents of this order and the particular restrictions set forth in this paragraph. Once materials are clearly and correctly labeled, compliance shall be the responsibility of the Reviewing Party. Materials marked as "Not Available to Competitive Duty Personnel" shall be returned or destroyed at the conclusion of proceedings as otherwise provided for herein.

23. If a Participant believes that Protected Materials previously distributed to Reviewing Representatives contain market sensitive information, public disclosure of which would competitively harm the Participant, and should be treated as if it had been labeled "Not Available to Competitive Duty Personnel", the Participant must e-mail Participants on the restricted service list and the ListServe established for email addresses in this proceeding, specifically state which documents contain such data, make an informal showing as to why such data should be subject to the restrictions applicable to documents labeled "Not Available to Competitive Duty Personnel", and seek their consent to such treatment, and such consent shall not be unreasonably withheld. If no agreement is reached concerning the designation of previously distributed material as "Not Available to Competitive Duty Personnel", the Participant shall submit the dispute to the Presiding Judge. If previously distributed material is subsequently designated as "Not Available to Competitive Duty Personnel", it will be the responsibility of the Reviewing Party to ensure compliance with this order thereafter – the Producing Party will not be responsible for redistributing or re-labeling the documents or data.

NON-DISCLOSURE CERTIFICATE OF COMPETITIVE DUTY PERSONNEL

I hereby certify my understanding that access to Protected Materials identified as “Not Available to Competitive Duty Personnel” is provided to me pursuant to the terms and restrictions of the amended Protective Order in this proceeding, that I have been given a copy of and have read the amended Protective Order, and that I agree to be bound by it. I understand that the contents of such Protected Materials, any notes or other memoranda, or any other form of information that copies or discloses Protected Materials shall not be disclosed to anyone other than in accordance with that Protective Order. I further understand that access to Protected Materials identified as Not Available to Competitive Duty Personnel shall be restricted only to purposes of the litigation of this proceeding. I acknowledge that a violation of this certificate constitutes a violation of an order of the Federal Energy Regulatory Commission.

By: _____

Title: _____

Representing: _____

Date: _____